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The Declaration of Independence and International Law

David Armitage

THE Declaration of Independence is among the most heavily interpreted and fiercely discussed documents in modern history: among other secular texts only statutes and constitutions have generated greater amounts of commentary on comparable numbers of words. Yet the Declaration was neither a statute nor a constitution. It was originally irrelevant to domestic law, however often its ideals may have since been invoked.¹ It was, like “the Gettysburg Address, another piece of war propaganda with no legal force” and could not therefore be part of the fundamental law of the United States.² It may have helped to constitute American ideals of “life, liberty and the pursuit of happiness,” but it was not intended to become a document of constitutional law, despite its popular association (reaching back at least to Abraham Lincoln) with the Constitution and in particular with the Bill of Rights as a statement of basic political principle. It is therefore inappropriate to call it “America’s most fundamental constitutional document,” “the real preamble to the Constitution of the United States,” or even the key to constitutional interpretations in light of a natural rights philosophy, if by that it is understood to be a document equivalent in legal standing to the Constitution itself.³

David Armitage is an associate professor of history at Columbia University. For comments on earlier versions he is especially grateful to Joyce Chaplin, Stephen Conway, Noah Feldman, Eliga Gould, James Kloppenberg, Pauline Maier, Peter Onuf, Christopher Tomlins and two anonymous readers for the *Quarterly*.

¹ John Phillip Reid, “The Irrelevance of the Declaration,” in Hendrik Hartog, ed., *Law in the American Revolution and the American Revolution in the Law* (New York, 1981), 46–89; Carlton F. Larson, “The Declaration of Independence: A 225th Anniversary Re-Interpretation,” *Washington Law Review*, 76 (2001), 701–91. My thanks to Mr. Larson for a copy of his article before publication.

² Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (New York, 1978), 362.

³ Dennis J. Mahoney, “The Declaration of Independence as a Constitutional Document,” in Leonard W. Levy and Mahoney, eds., *The Framing and Ratification of the Constitution* (New York, 1987), 54, 65; Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (New York, 1995), 17; Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* (New York, 1997), 6–10.

The Declaration would seem to be a unique and unclassifiable text, without historical precedent for its enduring principles and with few contemporary parallels for its place in a national mythology. This is an illusion generated by traditions of interpreting the Declaration that do not reflect the intentions of its framers and would have been largely incomprehensible to its original audiences. Those aims and audiences have been revealed by the historical study of the Declaration, which began only at the turn of the twentieth century.⁴ Studies of the Declaration's reception, the various histories of how it was made and re-made in 1776 and thereafter, have excavated the changing status of the Declaration in American life.⁵ They have done little, however, to examine its reception beyond the United States, whether in 1776 or since. The parts of the Declaration that have been found most compelling in the United States for the last half century—above all, the “self-evident truths” of its second paragraph regarding individual rights “to life, liberty and the pursuit of happiness”—have been taken as the core of its meaning for its drafters and as its enduring contribution to political philosophy. This may seem obvious or unavoidable to commentators living amid the resurgence of “rights talk” since the Second World War and the 1948 Universal Declaration of Human Rights, but that does not mean it has always been so.⁶ In fact, the Declaration only became an object of reverent exegesis in the early nineteenth century, when a civil religion of national patriotism sanctified it as “American Scripture,” a status it has held consistently and continuously only since the Civil War.⁷ That status is unique to its place in American national life. The Declaration has also been excerpted, imitated, and even occasionally revered in places other than the United States, but nowhere else does it possess such an aura of sanctity.

⁴ Herbert Friedenwald, *The Declaration of Independence, An Interpretation and an Analysis* (New York, 1904); John H. Hazelton, *The Declaration of Independence: Its History* (New York, 1906); Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York, 1922).

⁵ Charles D. Desbler, “How The Declaration Was Received in the Old Thirteen,” *Harper's New Monthly Magazine*, 85 (July 1892), 165–87; Philip F. Derweiler, “The Changing Reputation of the Declaration of Independence: The First Fifty Years,” *William and Mary Quarterly*, 3d Ser., 19 (1962), 557–74; Philip S. Foner, ed., *We, the Other People: Alternative Declarations of Independence by Labor Groups, Farmers, Woman's Rights Advocates, Socialists, and Blacks, 1829–1975* (Urbana, Ill., 1976); Merrill D. Peterson, “*This Grand Pertinacity*: Abraham Lincoln and the Declaration of Independence” (Fort Wayne, 1991).

⁶ Thomas L. Haskell, “The Curious Persistence of Rights Talk in the ‘Age of Interpretation,’” *Journal of American History*, 74 (1987), 984–1012; Michael J. Lacey and Knud Haakonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law, 1791 and 1991* (Cambridge, 1991); Richard A. Primus, *The American Language of Rights* (Cambridge, 1999), chap. 5, “Rights after World War II.”

⁷ Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York, 1997), chap. 4.

Whereas historians of the Declaration's reception have concentrated on its afterlife in the United States, students of its composition have generally looked to Europe for its inspiration. Their studies have produced vigorous disagreement over the sources of the Declaration's doctrine, whether derived from constitutionalist theories of resistance, the natural rights theories of John Locke, the broader tradition of natural law, the common-sense epistemology of the Scottish Enlightenment, the heterodox theology of Viscount Bolingbroke, or the English language of classical republicanism.⁸ There has also been much controversy regarding the Declaration's form. Perhaps it was a typical exercise in mid-eighteenth-century logic, indebted to William Duncan's textbook, which Thomas Jefferson almost certainly studied as a student at the College of William and Mary.⁹ Maybe it was modeled on the opening of a bill of indictment in a civil pleading.¹⁰ It may have been a script for declamation, marked up and composed as if a score for public performance and hence meant to persuade by rhetoric rather than to convince by logical proof, or it may have formed the typographical expression of a collective identity, a truly democratic artifact of the age of mechanical reproduction.¹¹ The Declaration's language and genre could have been indebted to all these sources at once. Its lasting appeal and its susceptibility to interpretation and appropriation might therefore derive not from the self-evidence of the "truths" it professed to have discovered but rather from its eclecticism, and hence its ability to appeal simultaneously to many different audiences.

⁸ Erich Angermann, "Ständische Rechtstraditionen in der Amerikanischen Unabhängigkeitserklärung," *Historische Zeitschrift*, 200 (1965), 61–91; Becker, *Declaration of Independence*; Morton White, *The Philosophy of the American Revolution* (New York, 1978); Gerber, "Whatever Happened to the Declaration of Independence? A Commentary on the Republican Revisionism in the Political Thought of the American Revolution," *Polity*, 26 (1993), 214–19; Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame, 1996); Wills, *Inventing America*; Ronald Hamowy, "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America: Jefferson's Declaration of Independence*," *WMQ*, 3d Ser., 36 (1979), 503–23; Andrew J. Reck, "The Enlightenment in American Law, I: The Declaration of Independence," *Review of Metaphysics*, 44 (1991), 549–73; Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* (Lexington, Ky., 1998); John Alvis, "Milton and the Declaration of Independence," *Interpretation: A Journal of Political Philosophy*, 25 (1998), 367–405.

⁹ Wilbur Samuel Howell, "The Declaration of Independence and Eighteenth-Century Logic," *WMQ*, 3d Ser., 18 (1961), 463–84.

¹⁰ George Anastaplo, "The Declaration of Independence," *Saint Louis University Law Journal*, 9 (1965), 391–94; Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, Mass., 1984), 63.

¹¹ Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford, 1993); Thomas Starr, "American Relations: Fabricating the Image of the Declaration of Independence," *AIGA Journal of Graphic Design*, 16 (Dec. 1998), 18–23.

Disagreement about the Declaration's sources and character has created confusion about its original purpose, whether as a text for internal or international consumption; as the enactment of Independence itself or the justification of Independence after the fact; as a contingent and strategic document or as a universal statement of "self-evident truths" regarding the "inalienable rights" of all human beings. At the risk of adding to the mountain of scholarship on the Declaration of Independence, this article offers an interpretation that situates the Declaration in two overlapping contexts that recent commentary has generally slighted: law and international relations. As John Phillip Reid has noted, historians of the Declaration generally avoid its legal context in order to search for its meaning and genesis in more intellectually fashionable sources.¹² However, law in Reid's sense means domestic or municipal law, the enactments of Congress and the judgments of courts. This article proposes a different legal context for both the immediate composition and the longer-term reception of the Declaration. That context can be found in what was called at the time "the law of nature and of nations" and that was just coming to be called "international law." Such law both provided norms for the behavior of states and was derived from an empirical observation of that behavior: in the first mode, it was close to classical conceptions of natural law and in the second to what was coming to be called "positive" law in the international realm. This article locates the Declaration in these two conceptions of international law and argues that its place in these conceptions can partly account for its form and its early reception in Europe.

The Declaration should thus be interpreted as "a document performed in the discourse of *jus gentium* [law of nations] rather than *jus civile* [civil law]" and hence as a statement of the powers and capacities of states as much as of the rights and duties of individuals.¹³ The interpretation of the Declaration of Independence offered here comprises four parts. First, it treats the argument of the Declaration, in an attempt to answer the question: "What Did the Declaration Declare?"¹⁴ Second, it reconstructs the early reception of the Declaration in Europe. Third, it examines the context of the Declaration's composition and argues that it arose from a transitional and eclectic moment in the history of international law when both natural law and the positive law of nations could be appealed to equally (as they were in the Declaration), a moment that in retrospect came to be seen as crucial in a shift away

¹² Reid, "Irrelevance of the Declaration."

¹³ J.G.A. Pocock, "Political Thought in the English-Speaking Atlantic: I, The Imperial Crisis," in Pocock, ed., *The Varieties of British Political Thought, 1500–1800* (Cambridge, 1995), 281.

¹⁴ Joseph J. Ellis, ed., *What Did the Declaration Declare?* (Boston, 1999).

from naturalism to positivism in the realm of international law. Finally, it concludes with a brief assessment of the implications of such a recontextualization of the Declaration of Independence for a historical understanding of the American Revolution. Such an approach emphasizes the assertions of autonomy the Declaration made for the United States in the international order rather than the claims made on behalf of individuals in relation to their governments. To interpret the Declaration in this way is to draw it out of its traditional American setting as the foundation of a “national compact,” the birth certificate of a nation, or the secular scripture of a self-chosen people; instead, it puts it into the more cosmopolitan contexts of international law and of the relations between states.¹⁵

The argumentative structure of the Declaration falls into five parts.¹⁶ The first paragraph outlines the immediate statement of purpose, the necessity of declaring the causes that compelled one people to dissolve the political bands that had connected them with another. The second paragraph states the principles on which legitimate government rests and for the violation of which it might be justifiable to “throw off such Government, and to provide new Guards for . . . future security.” The following bill of grievances lists the alleged “injuries and usurpations” by George III that had justified separation from that government.¹⁷ The fourth section narrates the response to colonial complaints in order to show that, the grievances having gone unredressed and the Americans’ “British brethren” being “deaf to the voice of justice and of consanguinity,” “necessity . . . denounces our Separation.” On this basis, the Declaration concludes in its fifth part that “these United Colonies are, and of Right ought to be Free and Independent States”: this was what Congress had resolved on July 2, 1776, and, once Congress had restored these words to the final draft, this was what the Declaration declared.¹⁸

The logical structure of the Declaration provides a conclusion, based on a major premise, a minor premise, and two proofs. The major

¹⁵ Pace Donald S. Lutz, “The Declaration of Independence as Part of an American National Compact,” *Publius: The Journal of Federalism*, 19 (1989), 41–58.

¹⁶ Howard Mumford Jones, “The Declaration of Independence: A Critique,” *Proceedings of the American Antiquarian Society*, n. s., 85 (1975), 55.

¹⁷ Sydney George Fisher, “The Twenty-Eight Charges Against the King in the Declaration of Independence,” *Pennsylvania Magazine of History and Biography*, 31 (1907), 257–303; Wills, *Inventing America*, 65–75; Maier, *American Scripture*, 105–23.

¹⁸ “The Declaration of Independence as Adopted by Congress,” July 4, 1776, in Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al., 28 vols. to date (Princeton, 1950–), 1:429–32. The phrase “these United Colonies are, and of Right ought to be Free and Independent States” was added by Congress to the final draft of the Declaration: Boyd, *The Declaration of Independence: The Evolution of the Text*, ed. Gerard W. Gawalt (Washington, D. C., 1999), 35; Maier, *American Scripture*, 148.

premise, stated in the opening paragraph, is that causes of separation must be declared; the minor premise, in the second paragraph, is that there can be violations of principle that would justify separation. The first proof consists in the evidence that such violations have repeatedly taken place; the second proof, that no redress or remission for such violations has been offered. On these grounds, the conclusion follows that separation can be justified in "the opinions of mankind."¹⁹ Within this logical structure, the statement of "self-evident" truths in the second paragraph of the Declaration—the paragraph that has attracted most modern commentary and that has come to guarantee the Declaration's place in American national mythology—was strictly subordinate to the necessity of proving the grounds for the freedom and independence of the United States. As Lincoln shrewdly noted in 1857, "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use."²⁰

Almost all commentary has nonetheless focused on the second paragraph of the Declaration and its natural rights philosophy. This is in spite of the fact that it provided the minor premise, not the major premise, for separation and was logically equivalent to the tabulation of grievances among the justifications for declaring Independence. In concentrating on that paragraph, commentators have generally ignored the first and last paragraphs, which together form the Declaration's irreducible logical skeleton.²¹ Those paragraphs contain the major premise and the conclusion; they thus affirm the two indispensable statements

¹⁹ As also argued by Zuckert, *Natural Rights Republic*, 16–17; compare the alternative accounts of the Declaration's logical structure in Howell, "Declaration of Independence and Eighteenth-Century Logic," 480–81, and Stephen E. Lucas, "Justifying America: The Declaration of Independence as a Rhetorical Document," in Thomas W. Benson, ed., *American Rhetoric: Context and Criticism* (Carbondale, Ill., 1989), 91.

²⁰ Lincoln, "Speech at Springfield, Illinois," June 26, 1857, in Roy P. Basler et al., eds., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N. J., 1953–1955), 2:406.

²¹ The exceptions are Edward Dumbauld, *The Declaration of Independence and What It Means Today* (Norman, Okla., 1950), 34–44, 153–55; Charles Burton Marshall, *American Foreign Policy as a Dimension of the American Revolution* (Washington, D. C., 1974), 8–9, 19; Dumbauld, "Independence under International Law," *American Journal of International Law*, 70 (1976), 425–31; Wills, *Inventing America*, 325–32; Pocock, *The Politics of Extent and the Problems of Freedom, Colorado College Studies*, 25 (Colorado Springs, 1988), 13–15; Pocock, "States, Republics, and Empires: The American Founding in Early Modern Perspective," in Terence Ball and Pocock, eds., *Conceptual Change and the Constitution* (Lawrence, Kan., 1988), 55–77; Pocock, "Political Thought in the English-Speaking Atlantic," 280–82; Maier, *American Scripture*, 132–33, 142; Peter S. Onuf, "A Declaration of Independence for Diplomatic Historians," *Diplomatic History*, 22 (1998), 71–72, 82–83.

that constitute the Declaration as a declaration of *independence*: that the United States were now among “the powers of the earth” and that they were “Free and Independent States.” *Quod erat demonstrandum*.

The Declaration of Independence was a declaration in three senses. The first is that understood by William Blackstone and other eighteenth-century common lawyers, that is, “the *declaration, narratio, or count . . .*; in which the plaintiff sets forth his cause of complaint at length”: its third section approximated to such an account.²² It is also a document “in the tradition[s] of declarations as a genre of British political discourse . . . in a line of descent from the revolutionary parliamentary declarations of the seventeenth century.”²³ It is, moreover, a declaration in the sense understood by international lawyers: that is, an expression of “will, . . . intent or . . . opinion when acting in the field of international relations,” such as a declaration of war, which could be made “either by a general manifesto, published to all the world; or by a note to each particular court, delivered by an ambassador.”²⁴ This particular “general manifesto” began by announcing the arrival of new actors on the international stage and expressed a duty to account for their emergence:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.²⁵

The Declaration’s audience was the whole of “mankind,” not only those who might call themselves Americans by virtue of the fact that they had cast off their allegiance to the British crown and who could thus voluntarily engage themselves as citizens of an independent state or states.²⁶

²² Blackstone, *Commentaries on the Laws of England*, 4 vols. (London, 1765–1769), 3:293.

²³ Lucas, “The Rhetorical Ancestry of the Declaration of Independence,” *Rhetoric and Public Affairs*, 1 (1998), 151.

²⁴ Carl-August Fleischhauer, “Declaration,” in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 7 (Amsterdam, 1984), 67; [Robert Plumer Ward], *An Enquiry into the Manner in which the Different Wars in Europe Have Commenced, . . . To which Are Added the Authorities upon the Nature of a Modern Declaration* (London, 1805), 3.

²⁵ “The Declaration of Independence,” in *Papers of Thomas Jefferson*, ed. Boyd et al., 1:429. “Separate and equal” replaced “equal and independent” in Jefferson’s Rough Draft; Boyd, *Declaration of Independence*, ed. Gawalt, 67.

²⁶ James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill, 1978), chap. 7, “The Idea of Volitional Allegiance.”

The final substantive sentence of the Declaration now defined more precisely what it would mean to take the part of one of “the powers of the earth”:

as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.²⁷

Congress had been exercising most of the rights it now formally claimed—negotiating with Britain, appointing agents to work on its behalf abroad, corresponding with foreign powers, seeking aid—for almost two years before the Declaration.²⁸ Among those rights was the authority to make meaningful declarations to the “candid world.” The Declaration itself was just such an act. It was a speech-act that not only *communicated* the fact of the independence of the United States to the world but by so doing also *performed* the independence it declared.²⁹

The opening and closing statements of the Declaration have been taken for granted because they seem, in retrospect, successfully and enduringly to have confirmed American Independence by performing an independent declaration. This may account for the relative lack of commentary these passages have received. Yet they are the most prominent sentences in the document, the statements of what the United States intended to become—“to assume among the powers of the earth the separate and equal station to which the Laws of Nature and of Nature’s God entitle them”—and of what they could do once they had achieved that goal—“to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” The rest of the Declaration provided only a statement of the abstract principles on which the assertion of such standing in the international order rested and an accounting of the grievances that had compelled the assumption of that status.

The diplomatic, strategic, and international purpose of declaring Independence partly explains the logical structure of the Declaration and accounts for the necessity of declaring Independence at all. As the concluding (and conclusive) sentence of the Declaration puts it, the pre-

²⁷ “The Declaration of Independence,” in *Papers of Thomas Jefferson*, ed. Boyd et al., 1:432.

²⁸ Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774–1776* (Princeton, 1987), 206–23.

²⁹ For the speech-act theory of “locutionary” (that is, communicative) and “illocutionary” (performative) force see J. L. Austin, *How to Do Things with Words* (Cambridge, Mass., 1962).

cise intention was to “levy war” and “contract alliances” against Great Britain. This had become increasingly urgent since the king had declared the colonists to be rebels in August 1775 and as the colonists then began their search for allies against Great Britain.³⁰ In order to turn a civil war into a war between states, and thus to create legitimate corporate combatants out of individual rebels and traitors, it was essential to declare war and to obtain recognition of the legitimacy of such a declaration. In October 1775, John Adams wondered whether independent American ambassadors might not be rebuffed by foreign powers: “Would not our Proposals and Agents be treated with Contempt?”³¹ Richard Henry Lee likewise noted in April 1776 that “no State in Europe will either Treat or Trade with us so long as we consider ourselves Subjects of G[reat] B[ritain]. Honor, dignity, and the customs of states forbid them until we take rank as an independant people.”³² Fear of a partition treaty among the European powers made it yet more urgent for the colonies to constitute themselves as independent actors in the international order.³³ The likely partitioners were the Catholic monarchies of Europe in concert with Britain. John Dickinson warned that “[a] PAR[TI]T[I]ON of these Col[onie]s will take Place if G[reat] B[ritain] cant conq[uer] Us.”³⁴ In retrospect and in light of the French alliance of 1778, such fears appear groundless, but they were real enough in the years following the division of North America between Britain and Spain in the aftermath of the Seven Years’ War, in the wake of the French capture of Corsica in 1768, and after the first Partition of Poland in 1772, in which Prussia, Austria, and Russia had partially dismembered Europe’s largest state. As Lee warned, “A slight attention to the late proceedings of many European Courts will sufficiently evince the spirit of partition, and the assumed right of disposing of Men & Countries like live stock on a farm. . . . Corsica, & Poland indisputably prove this.”³⁵

³⁰ The transition from colonists to rebels is traced on the British side in Stephen Conway, “From Fellow-Nationals to Foreigners: British Perceptions of the Americans, circa 1739–1783” (infra, pp. 65–100).

³¹ John Adams to James Warren, Oct. 7, 1775, in Worthington C. Ford, ed., *The Warren-Adams Letters: Being Chiefly a Correspondence among John Adams, Samuel Adams, and James Warren*, 2 vols. (Boston, 1917–1925), 1:127–28.

³² Lee to Patrick Henry, Apr. 20, 1776, in James Curtis Ballagh, ed., *The Letters of Richard Henry Lee*, 2 vols. (New York, 1911–1914), 1:178.

³³ James H. Hutson, “The Partition Treaty and the Declaration of American Independence,” *JAH*, 58 (1971–1972), 875–96; Piotr S. Wandycz, “The American Revolution and the Partitions of Poland,” in Jaroslaw Pelenski, ed., *The American and European Revolutions, 1776–1848: Sociopolitical and Ideological Aspects* (Iowa City, 1980), 95–110.

³⁴ J. H. Powell, ed., “Speech of John Dickinson Opposing the Declaration of Independence, 1 July, 1776,” *PMHB*, 65 (1941), 478.

³⁵ Lee to Patrick Henry, Apr. 20, 1776, 177.

It was therefore necessary for the colonists to create juridical bodies with which the European powers could make alliances and conduct commerce. Thomas Paine had ended *Common Sense* (January 9, 1776) with the most extensive statement of this argument for independence, on the grounds of the “custom of Nations” (by which a mediator might negotiate peace between warring states), the necessity of foreign alliances, and the desire to avoid the imputation of rebellion. Above all, Paine, like Lee, noted the need for a “manifesto to be published, and despatched to foreign Courts”; until such a manifesto or declaration was produced, Paine concluded, “the custom of all Courts is against us, and will be so, until by an Independance, we take rank with other Nations.”³⁶ The same point had been repeated frequently in the local instructions, addresses, and resolutions directed to the delegates to the Continental Congress, “to concur with the Delegates of the other Colonies in declaring Independency, and forming foreign alliances,” “to cast off the *British* yoke, and to enter into a commercial alliance with any nation or nations friendly to our cause,” “to beware of any other than commercial alliances with foreigners,” to express “the ardent wish of our souls that *America* may become a free and independent State,” and hence “to declare the United American Colonies free and independent States.”³⁷ Lee’s motion of June 7 to declare “That these United Colonies are, and of right ought to be, free and independent States,” “That it is expedient forthwith to take the most effectual measures for forming foreign Alliances,” and “That a plan of confederation be prepared and transmitted to the respective Colonies” led Congress to set up three overlapping committees: to compose a declaration of independence, to draft a model treaty, and to draw up articles of confederation.³⁸ In debate on July 1, John Dickinson made last-ditch arguments against any declaration and warned against any general manifesto because “for[eign] Pow[ers] will not rely on Words,” recommending instead private negotiations with European powers (especially France):

³⁶ Paine, *Common Sense* (Philadelphia, 1776), 77–78.

³⁷ North Carolina Instructions (Apr. 12, 1776); Instructions for the Delegates of Charlotte County, Virginia (Apr. 23, 1776); Address and Instructions of the Freeholders of [Buckingham] County, Virginia (n. d.); Virginia Instructions (May 15, 1776); “Meeting of the Inhabitants of the Town of Malden” (May 27, 1776); Connecticut Instructions (June 14, 1776), all in Peter Force, ed., *American Archives: Fourth Series. Containing a Documentary History of the English Colonies in North America, From the King’s Message to Parliament, of March 7, 1774, to the Declaration of Independence by the United States*, 6 vols. (Washington, D. C., 1833–1846), 5:1322, 1035, 1208, 6:461–62, 602, 868.

³⁸ Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774–1789*, 34 vols. (Washington, D. C., 1904–1937), 5:425–26; Wills, *Inventing America*, 326–29.

“We must not talk gen[eral]ly of for[eign] Pow[ers] but [only] of those We expect to fav[o]r. Us.” Envoys had already been sent to Europe, however, and congressional sentiment was overwhelmingly in favor of the Declaration. Lee’s resolution passed on July 2 without any dissenting vote, thanks to the abstention of the Pennsylvania delegation.³⁹

Among the sources deployed by the overlapping committees were some of the basic documents of eighteenth-century international relations. Benjamin Franklin argued in December 1775 that “the circumstances of a rising State make it necessary frequently to consult the law of nations”; accordingly, he distributed copies obtained from France of the 1775 Amsterdam edition of the Swiss jurist Emerich de Vattel’s *Droit des Gens* (1758) to the Library Company of Philadelphia, the Harvard College Library, and Congress itself.⁴⁰ He also supplied John Adams with “a printed volume of treaties,” which he marked up in pencil.⁴¹ The congressional committees thus had available to them the most up-to-date tools of contemporary diplomacy: Vattel’s French compendium of the law of nations (an instant classic on its publication in 1758) and one of the treaty collections that had become indispensable to diplomats and statesmen since they had first been compiled in the late seventeenth century.⁴² In the latter, Adams certainly found the templates for a model treaty in the Anglo-French commercial alliances of 1686 and 1713; in the former, Jefferson and his colleagues possessed the common wisdom of mid-eighteenth-century European diplomacy that “independence is ever necessary to each state,” to secure which “it is sufficient that nations conform to what is required of them by the natural and general society,

³⁹ Powell, ed., “Speech of John Dickinson Opposing the Declaration of Independence,” 471, 474; Milton E. Flower, *John Dickinson, Conservative Revolutionary* (Charlottesville, 1983), 161–66.

⁴⁰ Franklin to Charles Dumas, Dec. 19, 1775, in Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence of the United States*, 6 vols. (Washington, D. C., 1889), 2:64; Vattel, *Le Droit des Gens* (Amsterdam, 1778), in Library Company of Philadelphia (call number Rare E Vatt 303. Q), and Houghton Library, Harvard University (call number *AC7. F8545. Zz775V). Congress’s copy has not been located.

⁴¹ Adams, *Autobiography*, in *The Works of John Adams*, ed. Charles Francis Adams, 10 vols. (Boston, 1850–1856), 2:516; Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton, 1961), 50. The volume of treaties was [Henry Edmunds and William Harris, eds.], *A Compleat Collection of All the Articles and Clauses which Relate to the Marine, in the Several Treaties Now Subsisting Between Great Britain and Other Kingdoms and States* (London, 1760), Houghton Library (call number *EC7 Ed596 741 ed); Robert J. Taylor et al., eds., *Papers of John Adams*, 10 vols. to date (Cambridge, Mass., 1977–), 4:262–63. My thanks to Celeste Walker for this information.

⁴² Mario Toscano, *The History of Treaties and International Politics*, 2 vols. (Baltimore, 1966), 1:47–66.

established among all mankind.”⁴³ Such materials could easily have remedied the deficiencies in Jefferson’s own knowledge of the law of nations (hardly any trace of which in the decades before 1776 can be found in his legal commonplace book).⁴⁴ Out of them, Jefferson, his fellow committee members, and Congress itself created a document calculated to appeal equally to audiences at home and abroad.

Despite the careful drafting of the Declaration for domestic and foreign consumption, the immediate response from abroad was a deafening diplomatic silence, in Britain, France, and more generally across Europe.⁴⁵ Four copies of the Declaration made their way into the British State Papers in the summer and autumn of 1776.⁴⁶ Lord Howe’s secretary, Ambrose Serle, privately expressed his horror at the Declaration in his diary on July 13: “A more impudent, false and atrocious Proclamation was never fabricated by the Hands of Man,” but none of his superiors registered any such sentiments as they dispatched their copies back to London.⁴⁷ It appeared in London newspapers in mid-August 1776,⁴⁸ was

⁴³ Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758), Eng. trans. (London, 1760), xi.

⁴⁴ L[ibrary of] C[ongress], Jefferson Papers, ser. V, vol. 13, “Miscellaneous Papers: Jefferson’s [Legal] Common-place Book”; *The Commonplace Book of Thomas Jefferson: A Repertory of His Ideas on Government*, ed. Gilbert Chinard, *The Johns Hopkins Studies in Romance Literatures and Languages*, extra vol. 2 (Baltimore, 1926).

⁴⁵ Richard W. Van Alstyne, *Empire and Independence: The International History of the American Revolution* (New York, 1965), 96, 100, 106, 108–10; Elizabeth S. Kite, “How the Declaration of Independence Reached Europe,” *Daughters of the American Revolution Magazine*, 62 (July 1928), 405–13; Howard H. Peckham, “Independence: The View from Britain,” *Proceedings of the American Antiquarian Society*, n. s. 85 (1975), 387–403; R. R. Palmer, “The Declaration of Independence in France,” *Studies on Voltaire and the Eighteenth Century*, 154 (1976), 1569–79; Horst Dippel, *Germany and the American Revolution, 1770–1800*, trans. Bernhard A. Uhlendorf (Chapel Hill, 1977), 29, 36, 100–05, 276, 347; Jan Willem Schulte Nordholt, *The Dutch Republic and American Independence*, trans. Herbert R. Rowen (Chapel Hill, 1982); Franco Venturi, *The End of the Old Regime in Europe, 1776–1789*, vol. 1: *The Great States of the West*, trans. R. Burr Litchfield (Princeton, 1991), 13, 17 (Italy); Luis Ángel García Melero, *La Independencia de los Estados Unidos de Norteamérica a través de la Prensa Española . . . Los Precedentes (1763–1776)* (Madrid, 1977), 297–98. More generally, see Willi Paul Adams and David Thelen, eds., “Roundtable: Interpreting the Declaration of Independence by Translation,” *JAH*, 85 (1999), 1280–1458.

⁴⁶ ADM 11487/34; CO 5/40/252; CO 5/177/29; CO 5/1353/401, PRO, Kew. Only one of these 4 copies is recorded in Michael J. Walsh, “Contemporary Broadside Editions of the Declaration of Independence,” *Harvard Library Bulletin*, 3 (1949), 31–43.

⁴⁷ Edward H. Tatum, Jr., ed., *The American Journal of Ambrose Serle, Secretary to Lord Howe, 1776–1778* (San Marino, Calif., 1940), 31.

⁴⁸ *Morning Chronicle* (London), Aug. 17, 1776; *British Chronicle* (London), Aug. 14–16, 1776; *St. James’s Chronicle* (London), Aug. 15–17, 1776; *General Evening Post* (London), Aug. 15–17, 1776; *Annual Register* (London) for 1776, 261–64; D. D.,

printed in Edinburgh on August 20, 1776 (five days before David Hume's death),⁴⁹ Dublin on August 24,⁵⁰ Leiden on August 30,⁵¹ Copenhagen on September 2,⁵² Florence by mid-September,⁵³ and a German translation (by the Swiss disciple of Rousseau Isaak Iselin) that appeared in Basel in October.⁵⁴ News of Independence had also reached Warsaw by September 11, though the Declaration itself was only briefly summarized there.⁵⁵ Along its path through Europe, it split the radical movement in England between supporters and opponents of Independence (as pro-Ministerial writers had predicted), excited admiration but not imitation in Ireland, and merited refutation in Scotland but received little or no direct comment in Italy, Germany, Poland, Switzerland, or Spain.⁵⁶ The most worrying silence as far as the Americans were concerned came from France, the original object of the United States's overtures for an alliance. The first of two copies of the Declaration sent to the American representative in Paris, Silas Deane, was lost, and the second arrived only in November 1776, after the news of American Independence had been circulating for at least three months elsewhere in Europe. When France did eventually enter into

"London Newspapers of 1776 and the Declaration of Independence," *The Nation*, 66 (Feb. 17, 1898), 127–28; Solomon Lutnick, *The American Revolution and the British Press, 1775–1783* (Columbia, Mo., 1967), 75–76.

⁴⁹ *Caledonian Mercury* (Edinburgh), Aug. 20, 1776; *Scots Magazine* (Edinburgh), 38 (1776), 433–36; Donald W. Livingston, "Hume, English Barbarism, and American Independence," in Richard B. Sher and Jeffrey R. Smitten, eds., *Scotland and America in the Age of Enlightenment* (Princeton, 1990), 133.

⁵⁰ *Freeman's Journal* (Dublin), Aug. 24, 1776.

⁵¹ *Gazette de Leyde* (Leiden), Aug. 30, 1776; Jeremy D. Popkin, *News and Politics in the Age of Revolution: Jean Luzac's Gazette de Leyde* (Ithaca, 1989), 151.

⁵² *Berlingske Tidende* (Copenhagen), Sept. 2, 1776, reproduced in Albert P. Blaustein, Jay Sigler, and Benjamin R. Breede, eds., *Independence Documents of the World*, 2 vols. (New York, 1977), 1:187.

⁵³ *Gazzetta Universale o Sieno Notizie Istoriche, Politiche, di Scienze, Arti, Agricoltura* (Florence) and *Notizie del Mondo* (Florence), Sept. 14, 1776 (I am very grateful to Guido Abbattista for locating the latter journal and confirming its contents); Venturi, *End of the Old Regime in Europe*, trans. Litchfield, 1:50.

⁵⁴ *Ephemeriden der Menschheit* (Basel), Oct. 1776, 96–106; Dippel, *Germany and the American Revolution, 1770–1800*, trans. Uhlendorf, 29.

⁵⁵ *Gazeta Warszawska* (Warsaw), Sept. 11, 1776; Irene M. Sokol, "The American Revolution and Poland: A Bibliographical Essay," *Polish Review*, 12:3 (1967), 8.

⁵⁶ Guy Johnson to Lord George Germain, Aug. 9, 1776, CO 5/177/113, PRO; Neil Longley York, *Neither Kingdom nor Nation: The Irish Quest for Constitutional Rights, 1698–1800* (Washington, D. C., 1994), 103; "An Answer to the Declaration of Independence," *Scots Magazine*, 38 (1776), 652–55; 39 (1777), 65–74, 121–28, 177–86, 233–42, 289–93 (reprinting extracts from [John Lind and Jeremy Bentham], *An Answer to the Declaration of the American Congress* [London, 1776]); D. B. Swinfen, "The American Revolution in the Scottish Press," in Owen Dudley Edwards and George Shepperson, eds., *Scotland, Europe, and the American Revolution* (Edinburgh, 1976), 71; Venturi, *End of the Old Regime in Europe*, trans. Litchfield, 1:50.

alliance with the United States in February 1778, following the watershed American defeat of British forces at the Battle of Saratoga, it was "to maintain effectually the liberty, Sovereignty, and independence absolute and unlimited of the said united States."⁵⁷ This was what Congress had hoped for all along, at least since it had simultaneously created committees for drafting the Declaration and a model treaty of alliance and commerce.

The British government could not respond officially to the Declaration for that "would be to recognise that equality and independence, to which subjects, persisting in revolt, cannot fail to pretend. . . . This would be to recognise the right of other states to interfere in matters, from which all foreign interposition should for ever be precluded."⁵⁸ Lord North's ministry did, however, commission a rebuttal of the Declaration (from which these words came). This comprised mostly a point-by-point examination and refutation of the charges against the king. Five hundred copies were sent from London to America, to instruct British troops and to rebut the arguments of the rebels.⁵⁹ The author of this *Answer to the Declaration of the American Congress* (1776) was John Lind, a young lawyer and pamphleteer who had come to the administration's notice with the publication of his *Remarks on the Principal Acts of the Thirteenth Parliament* (1775) and *Three Letters to Dr Price, Containing Remarks on his Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (1776).⁶⁰ Lind denied that the Americans were still anything other than treacherous individuals, rather than states, and hence rebels rather than legitimate corporate belligerents. To do otherwise would have been to make a mockery of the idea of allegiance, let alone legality: if the colonists were acknowledged to be independent citizens of a foreign state, what could have prevented a pirate like Captain Kidd from just as easily protecting himself from criminal prosecution by declaring himself independent? "Instead of the guilty pirate, he would have become the *independent* prince; and taken among the *'maritime'*

⁵⁷ Article 2, Treaty of Alliance, Feb. 6, 1778, in Hunter Miller, ed., *Treaties and Other International Acts of the United States of America*, vol. 2: 1776–1818 (Washington, D. C., 1931), 36–37; William C. Stinchcombe, *The American Revolution and the French Alliance* (Syracuse, N. Y., 1969), 8–13.

⁵⁸ [Lind and Bentham], *Answer to the Declaration of the American Congress*, 5.

⁵⁹ William Knox to Sir William Howe, Nov. 6, 1776, CO 5/93/290, PRO.

⁶⁰ [Lind and Bentham], *Remarks on the Principal Acts of the Thirteenth Parliament* (London, 1775); [Lind], *Three Letters to Dr Price, Containing Remarks on his Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (London, 1776); Margaret E. Avery, "Toryism in the Age of the American Revolution: John Lind and John Shebbear," *Historical Studies* (Melbourne), 18 (1978), 24–36.

powers—‘*that separate and equal station, to which*’— he too might have discovered—‘*the laws of nature and of nature’s God entitled him.*” Finally, Lind mocked the colonists for their hypocrisy in announcing the natural equality of all mankind while failing to free their slaves: such rights were hardly inalienable and clearly not natural, if they were denied to “these wretched beings.”⁶¹

The *Answer to the Declaration* was almost the only foreign publication to comment on the natural-rights claims of the Declaration.⁶² It was accompanied by a “Short Review of the Declaration” that exposed the logical fallacies of the principles on which the Americans claimed their independence, and judged them to be tautologous, redundant, inconsistent, and hypocritical. “If to what they now demand they were entitled by any law of God,” thundered the reviewer, “they had only to produce that law, and all controversy was at an end. Instead of this, what do they produce? What they call self-evident truths. . . . At the same time, to secure these rights, they are content that Governments should be instituted. They perceive not, or will not seem to perceive, that nothing which can be called government ever was, or ever could be, in any instance, exercised, but at the expence of one or other of those rights” to life, liberty, or the pursuit of happiness.⁶³

The precocious attack on the language of individual natural rights in the *Answer to the Declaration* was a significant contribution to counter-revolutionary discourse. In particular, the “Short Review” formed a link between the American and French Revolutions because its author was not Lind but his friend Jeremy Bentham. Though American historians in general remain unaware of this fact, it has been known since 1968 and has received ample commentary by Bentham scholars.⁶⁴

⁶¹ [Lind and Bentham], *Answer to the Declaration of the American Congress*, 6–7, 95, 107.

⁶² Compare the passing remarks in [Thomas Hutchinson], *Strictures upon the Declaration of the Congress at Philadelphia* . . . (London, 1776), 9–10, the only other full-length British pamphlet devoted to answering the Declaration; Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, Mass., 1974), 357–59.

⁶³ [Bentham], “Short Review of the Declaration,” in [Lind and Bentham], *Answer to the Declaration of the American Congress*, 120.

⁶⁴ Bentham to Lind, Sept. 1776, “American Declaration. Hints B.,” B[ritish] L[ibrary] Add. MS 33551, fols. 359r–60v, printed in Timothy L. S. Sprigge, ed., *The Correspondence of Jeremy Bentham*, vol. 1: 1752–76 (London, 1968), 341–44; Douglas G. Long, *Bentham on Liberty: Jeremy Bentham’s Idea of Liberty in Relation to his Utilitarianism* (Toronto, 1977), 51–54; H.L.A. Hart, “The United States of America,” in Hart, *Essays in Bentham: Studies in Jurisprudence and Political Theory* (Oxford, 1982), 63–65; Peter S. Onuf and Nicholas G. Onuf, “American Constitutionalism and the Emergence of a Liberal World Order,” in George Athan Billias, ed., *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History* (New York, 1990), 77.

Bentham had earlier collaborated on Lind's *Remarks* and had prepared a devastating critique of the concept of "negative liberty" (as he was almost the first to call it) for inclusion in Lind's *Three Letters to Dr Price*.⁶⁵ Bentham remained consistently critical of the principles that underlay the American Declaration to the end of his life. "Who can help lamenting, that so rational a cause should be rested upon reasons, so much fitter to beget objections, than to remove them?" he complained in 1780, referring to the Virginia Declaration of Rights, the Massachusetts Declaration, and the Declaration itself; half a century later he still called the Virginia Declaration "a hodge-podge of confusion and absurdity, in which the thing to be proved is all along taken for granted."⁶⁶ The basis of his critique remained the same: only the positive acts of an identifiable legislator could be called laws, and only from such laws could any defensible rights be derived. To ascribe laws to nature, and to derive natural rights from such laws, was therefore not simply nonsense, it was doubly incoherent, "rhetorical nonsense,—nonsense upon stilts," as he called it in his demolition of the French Declaration of the Rights of Man and the Citizen almost twenty years after his earlier reply to the American Declaration.⁶⁷

Bentham's assault on natural law in the name of positive law was part of a larger argument between naturalism and positivism in late eighteenth-century philosophy and legal theory. It was in this period that "the law of nations, long and inextricably associated with the law of nature, came . . . to be understood as positive law, made by sovereign states, acting collectively through authorized means, for their progressively more complex needs."⁶⁸ The modern tradition of natural law had arisen in the early seventeenth century, most notably with the work of the Dutch jurist Hugo Grotius, and derived moral and political norms from nature, God, or human nature, rather than the acts of particular legislators or the contractual agreements of peoples and sovereigns. This

⁶⁵ Bentham, "Hey" (1776), Bentham Papers, University College London, 49:57–68, replying to Richard Hey, *Observations on the Nature of Civil Liberty, and the Principles of Government* (London, 1776); Long, *Bentham on Liberty*, 57–59; G. I. Molivas, "A Right, Utility, and the Definition of Liberty as a Negative Idea: Richard Hey and the Benthamite Conception of Liberty," *History of European Ideas*, 25 (1999), 75–92.

⁶⁶ Bentham, *An Introduction to the Principles of Morals and Legislation* (1780), ed. J. H. Burns and Hart (Oxford, 1996), 311 note; John Bowring, ed., *The Works of Jeremy Bentham*, 11 vols. (Edinburgh, 1843), 10:63.

⁶⁷ Bentham, "Anarchical Fallacies . . ." (1792), in Jeremy Waldron, ed., "Nonsense Upon Stilts": Bentham, Burke, and Marx on the Rights of Man (London, 1987), 53.

⁶⁸ Onuf and Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814* (Madison, 1993), 2.

theory had formed the dominant—if not unchallenged—theory of morality and politics for at least a century and a half, but by the third quarter of the eighteenth century its ascendancy in Britain, France, and Germany was beginning to wane.⁶⁹ It was therefore ironic that the language of individual natural rights that had sprung in its modern form from this tradition should have become so prominent during the era of the American and French Revolutions: only as the philosophical underpinnings that had made sense of it gave way did it gain a temporary, though far from permanent, hegemony over political discourse. By the end of the eighteenth century, natural rights was “an idea whose time had come too late in politics to coincide with its philosophical respectability.”⁷⁰

The gradual transition away from naturalism and toward positivism became especially evident in the field of international law. One symptom of the shift is the invention of the term “*international law*” itself, by Bentham in 1780.⁷¹ In retrospect, it came to appear that the lifetime of the generation of lawyers, politicians, and philosophers born in the mid-eighteenth century had encompassed an epochal transition in international norms. It would not be complete by the time that generation passed, but its progress was evident, and many thought it should be hastened. Jefferson asked, “Why should not this law of nations go on improving: Ages have intervened between its several steps; but as knowledge of late increases rapidly, why should not these steps be quickened?”⁷²

A standard narrative of the history of the law of nations that described a gradual waning of naturalism and a consequent rise in positivism began to emerge in this period. None of the commentators who compiled that narrative argued that the transition entailed the abrupt and exclusive substitution of positive international law in place of a law of nations (*ius gentium*) identified with the law of nature (*ius naturae*);

⁶⁹ On the history of this tradition see especially Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge, 1996); Haakonssen, ed., *Grotius, Pufendorf, and Modern Natural Law* (Aldershot, 1999); and T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge, 2000).

⁷⁰ Waldron, “Nonsense Upon Stilts,” 18.

⁷¹ Bentham, *Introduction to the Principles of Morals and Legislation*, ed. Burns and Hart, 6, 296; M. W. Janis, “Jeremy Bentham and the Fashioning of ‘International Law,’” *Amer. J. International Law*, 78 (1984), 408–10.

⁷² Jefferson, “Reasons in Support of the New Proposed Articles in the Treaties of Commerce” (Mar. 10, 1784), in *Diplomatic Correspondence of the United States from the Signing of the Definitive Treaty of Peace, 10th September 1783, to the Adoption of the Constitution, March 4, 1789*, 3 vols. (Washington, D. C., 1837), 1:532–34, quoted in Gregg L. Lint, “The American Revolution and the Law of Nations, 1776–1789,” *Diplomatic History*, 1 (1977), 34.

however, they did acknowledge that the eighteenth century had seen the increasing ascendancy of positive law.⁷³ This was distinct from the modern tradition of natural law, which had derived moral and political norms from nature, God, or human nature rather than the acts of particular legislators or the contractual agreements of peoples and sovereigns. This meant the supremacy of the international agreements, treaties, and customs derived from the consent of states and their sovereigns; its sources could be found in the mammoth collections of treaties that began publication in the late seventeenth century (and that continue to this day), in the history of the relations between states, and in the works of the great international publicists. Grotius and Vattel agreed that the *jus belli ac pacis* or the *droit des gens* was derived from both the law of nature and the consent of states. It was, however, “hardly possible that the simple law of nature should be sufficient, even between individuals, and still less between nations, when they come to frequent and carry on commerce with each other”; instead, states had to temper the law of nature in practice and by consent: “The whole of the rights and obligations thus established between two nations, form the positive law of nations between them. It is called *positive*, particular or arbitrary, in opposition to natural, universal and necessary law.”⁷⁴ Jefferson himself encapsulated contemporary wisdom when he stated in 1793 that “the Law of Nations . . . is composed of three branches. 1. the Moral law of our nature. 2. the Usages of nations. 3. their special Conventions.”⁷⁵

Before the mid-eighteenth century, the laws of nations had been almost completely assimilated to the laws of nature. These universal norms, accessible to all rational creatures, applied equally to individuals

⁷³ J. J. Moser, *Beyträge zu dem neuesten Europäischen Völkerrecht in Friedenszeiten*, 5 vols. (Tübingen, 1778–1780); Pierre Joseph Neyron, *Principes du droit des gens Européen conventionnel et coutumier* (Brunswick, 1783); D.H.L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, 2 vols. (Regensburg, 1785); G. F. von Martens, *Précis du Droit des Gens moderne de l'Europe*, 2 vols. (Göttingen, 1789; Eng. trans., Philadelphia, 1795); Ward, *Enquiry into the Foundations and History of the Law of Nations in Europe*, 2 vols. (London, 1795); Jean Louis Klüber, *Droit des Gens Moderne de l'Europe*, 2 vols. (Stuttgart, 1819); Frederick Eden, *An Historical Sketch of the International Policy of Modern Europe, as Connected with the Principles of the Law of Nature and of Nations* (London, 1823); Henry Wheaton, *Elements of International Law, with a Sketch of the History of the Science* (Philadelphia, 1836), 1–29, and Wheaton, *Histoire des progrès du droit des gens en Europe* (Leipzig, 1841; Eng. trans., New York, 1845). Some of this literature is briefly surveyed in Arthur Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (New York, 1954), 291–94.

⁷⁴ Georg Friedrich von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (1789), trans. William Cobbett (Philadelphia, 1795), 3–4.

⁷⁵ Jefferson, “Opinion on the Treaties with France,” Apr. 28, 1793, in *Papers of Thomas Jefferson*, ed. Boyd et al., 25:609.

and to societies. States were not simply analogous to persons (as in later conceptions of international law), but morally equivalent to them, in their autonomy, rationality, and duty to obey the dictates of natural law.⁷⁶ The increasingly bloody wars of eighteenth-century Europe and the extension of that bloodshed to the rest of the globe, however, made it even more obvious to commentators that deriving the law of nations from the law of nature offered no guarantees against aggression and may only have served to exacerbate international instability and bloodshed. David Hume had noted ominously in 1751, “The observance of justice, though useful among [nations], is not guarded by so strong a necessity as [it is] among individuals; and the *moral obligation* holds proportion with the *usefulness*.”⁷⁷ In 1795, the first English history of the law of nations declared unequivocally that “the argument concerning a particular System of Morality for *all* mankind, enjoined by the Law of Nature, as far as it is drawn from the *Universality* of its reception, must be given up.”⁷⁸ In the same year, Immanuel Kant condemned the greatest representatives of the modern tradition of natural law, “Hugo Grotius, Pufendorf, Vattel and the rest,” as “sorry comforters” (*leidige Tröster*) because “their philosophically and diplomatically formulated codes do not and cannot have the slightest *legal force*.”⁷⁹ No less pointedly, Bentham later ridiculed “the professors of natural law, . . . the Grotii and the Puffendorfs, the legislators of the human race,” who wanted to achieve the universalist ambitions of Alexander and Tamerlane “each one sitting in his armchair.”⁸⁰ Both Kant and Bentham proposed replacing the ineffective norms of natural law in international affairs with positive, enforceable agreements between nations, Kant in his proposed articles of perpetual peace, Bentham in his long-imagined digest of laws, the *Pannomion*. Such proposals were characteristic of the fifty years around the turn of the nineteenth century, when the shift from the natural-jurisprudential foundations of the law of nations toward a conception of positive international law became generally observable.

⁷⁶ See, generally, Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999).

⁷⁷ Hume, *An Enquiry Concerning the Principles of Morals* (1751), ed. Tom L. Beauchamp (Oxford, 1998), 100.

⁷⁸ Ward, *Enquiry into the Foundations and History of the Law of Nations in Europe*, 1:63.

⁷⁹ Kant, “Perpetual Peace: A Philosophical Sketch” (1795), in *Kant: Political Writings*, ed. Hans Reiss, 2d ed. (Cambridge, 1991), 103.

⁸⁰ “Voilà professeurs de la droit naturel qu'ils avoient rêvé voilà les Grotius et les Puffendorf législateur, et législateur du genre humain. Ce qui les Alexandres et les Tamerlan voulaient faire en traversant le globe, les Grotius et le Puffendorf faisaient assis chacun dans son fauteuil”: Bentham, “Pannomial Fragments” (1820s), BL Add. MSS 33550, fol. 92r, translated in Bowring, ed., *Works of Jeremy Bentham*, 3:220.

The international reception of the Declaration and the response to American Independence itself were symptomatic of the long transition from naturalism to positivism in the law of nations. The naturalist claims of the Declaration's second paragraph elicited almost no comment from contemporaries, but the Declaration itself became a central exhibit in debates about the positive law of nations. The central question of international law raised by the Declaration was deceptively simple but revealingly controversial: how did the Declaration declare independence? With his characteristic perceptiveness, Bentham, in the "Short Review of the Declaration," had noted that "it is one thing for them to *say*, the connection, which bound them to us, is *dissolved*, another to *dissolve* it; . . . to *accomplish* their *independence* is not quite so easy as to *declare* it."⁸¹ Though Bentham did not elaborate the point, this problem was the nub of the international legal argument regarding the Declaration—or any document with similar intent—as it unfolded in the two generations immediately after 1776: how could independence be declared, except by a body that was already independent, in the sense understood by the law of nations? A mere declaration could not constitute independence; it could only announce what had already been achieved by other means.⁸² Only on joining in the Franco-American alliance did the United States formally enter the international system; only thenceforth could the question of American Independence be treated as a positive, albeit contested, fact of international law. Yet the fact of Independence was one thing; the basis on which the opening of the Declaration had asserted it, quite another, for only positive acts could constitute statehood. If the Declaration's purpose was to enable the rebellious colonies to enter into diplomatic and commercial alliances with other powers, as Paine, Richard Henry Lee, the local declarations, and the drafting committee of the Continental Congress intended, at what point did the colonies become states and the rebels acquire legitimacy? If a mere declaration were insufficient and the acknowledgment of Independence by Britain inconceivable, would recognition by a third power, such as France, be necessary to ensure legitimacy? Or, indeed, would even recognition by third parties be inadequate until the metropolitan government had conceded Independence, as it did only by the Treaty of Paris in 1783?⁸³

⁸¹ [Bentham], "Short Review of the Declaration," 131.

⁸² Jacques Derrida, *Otobiographies: L'enseignement de Nietzsche et la politique du nom propre* (Paris, 1984), 13–32 (Eng. trans., Derrida, "Declarations of Independence," *New Political Science*, 15 (1986), 7–17); B. Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *American Political Science Review*, 85 (1991), 97–113.

⁸³ On the contemporary context of these issues see Julius Goebel, Jr., *The Recognition Policy of the United States* (New York, 1915, 1968), chap. 3, "Intervention and Recognition in the American Revolution."

These questions concerning independence, statehood, and recognition were at the heart of the positive law of nations, and the Declaration—like American Independence itself—was particularly received in this light after 1783 and in Europe. These aspects of the Declaration became the focus of the rapidly evolving argument over the theory of the legal recognition of states in this early positivist period. To claim an equal station for the United States among “the powers of the earth,” more was needed than the bare assertion that those states were entitled to their independence by virtue of the “laws of nature and of nature’s God.” The modern exponents of naturalism, like Grotius and Vattel, agreed that states did possess a natural right to existence, independence, and equality; the means by which new states might acquire that right, if they had not previously possessed it, only became a central topic of international legal argument in the late eighteenth century, partly in response to the issues of recognition raised by the Declaration of Independence itself.⁸⁴

The American Declaration became a prominent exhibit in the earliest discussion of the recognition of states. This came from the German jurist and belletrist J.C.W. von Steck in 1783. His approach was original in that he treated the recognition and legitimation of states *per se*, rather than of princes; previously, discussions of recognition had been confined to the acknowledgment of the rights of succession of individual rulers. His account accordingly focused on republics such as the United Provinces and the United States. In the latter case, Steck denied that American Independence had had any international meaning until it was formally and positively recognized by Britain. He wrote in the immediate aftermath of the Treaty of Paris and deemed French recognition in 1778 to have been premature and hence without constructive force, because not accompanied by any renunciation of rights by Britain.⁸⁵ In 1789, G. F. von Martens pressed Steck’s point further to argue that, “when once obedience has been formally refused, and the refusing party has entered into the possession of the independence demanded, the dis-

⁸⁴ C. H. Alexandrowicz, “The Theory of Recognition *In Fieri*,” *British Year Book of International Law*, 34 (1958), 176–98; James Crawford, *The Creation of States in International Law* (Oxford, 1979), 5–12; Wilhelm G. Grewe, *The Epochs of International Law*, rev. and trans. Michael Byers (Berlin, 2000), 343–48.

⁸⁵ Steck, “Versuch von Erkennung der Unabhängigkeit einer Nation, und eines Staats,” in von Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (Berlin, 1783), 49–56; Alexandrowicz, “Theory of Recognition *In Fieri*,” 180–84; Jochen A. Frowein, “Transfer or Recognition of Sovereignty—Some Early Problems in Connection with Dependent Territories,” *Amer. J. International Law*, 65 (1971), 568–71. My thanks to R. Russell Maylone of the Northwestern University Library for providing me with a copy of Steck’s *Versuche*.

pute becomes the same as those which happen between independent states," subject to the major proviso that the offended party could legitimately construe any aid or succor offered to the newly independent state as an act of war: "The conduct that Great Britain observed . . . after the Colonies of North America declared themselves independent, may serve to illustrate this subject."⁸⁶ By 1843, the question of recognition raised by American Independence had become one of the great *causes célèbres* of international law as it passed decisively into its positivist phase.⁸⁷

The success of the French alliance and the victory of the Americans in the War of Independence changed the status of the Declaration as a document. Soon after the official British recognition of American Independence by Article I of the Treaty of Paris, publicists recognized the Declaration as part of the modern positive law of nations. Charles Jenkinson's collection of treaties (1785) included it, for example, and used it to mark the most recent moment in the period in international affairs that had begun with the recognition of the independence of the United Provinces by the Treaty of Munster in 1649: "By the Treaties made at Paris in 1783, another Revolution was acknowledged and confirmed, viz. that of the United States of America." The Declaration appeared between the Spanish declaration concerning the Falkland Islands of 1771 and the Franco-American treaty of 1778, as an equivalent document in the positive law of nations.⁸⁸ Charles de Martens's *Précis du Droit des Gens moderne de l'Europe* (1789) listed it, along with the Articles of Confederation, which these same European commentators also construed as an international agreement.⁸⁹

By 1783, there could be no question of the Independence of the American states. The Declaration's purpose had been served, and arguments over the difference between *de facto* and *de jure* independence were now beside the point as far as the United States was concerned. British recognition of American Independence in 1783 meant the United States could legitimately do all the things that free and independent

⁸⁶ Martens, *Summary of the Law of Nations*, trans. Cobbett, 80 and note; Alexandrowicz, "Theory of Recognition *In Fieri*," 184–87.

⁸⁷ Charles de Martens, *Nouvelles causes célèbres du droit des gens*, 2 vols. (Leipzig, 1843), 1:113–209, 370–498.

⁸⁸ Jenkinson, *A Collection of All the Treaties of Peace, Alliance, and Commerce between Great-Britain and Other Powers . . .*, 3 vols. (London, 1785), 1:iii, 3:237–41.

⁸⁹ "List of the Principal Treaties . . . Between the Different Powers of Europe since the Year 1748 down to the Present Time," in Martens, *Summary of the Law of Nations*, trans. Cobbett, 362; Charles de Martens, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce*, 5 vols. (Göttingen, 1791–1807), 1:580; Charles de Martens, *Recueil de traités de paix . . . et de plusieurs autres actes servant à la connaissance des relations étrangères des puissances et états de l'Europe*, 8 vols. (Göttingen, 1817–35), 2:481–85 (Declaration), 486–502 (Articles of Confederation).

states may of right do, as they had been doing at least since 1774. They had therefore attained statehood in the international order. The acquisition of nationhood—defined as an internal self-consciousness of identity through shared history, traditions, and institutions—was a separate process, to which the Declaration was only definitively harnessed after the Civil War. The Fourth of July could be adopted as the birthday of the nation, but the Declaration itself remained the object of partisan dispute and competitive appropriation. The earliest American “citations of the Declaration were usually drawn from its final paragraph”—declaring Independence—but from the 1820s the natural rights claims of the second paragraph “gradually eclipsed altogether the document’s assertion of the right of revolution.”⁹⁰

The first generation of lawyers in the new republic observed that the United States had entered the international system at a peculiarly propitious time in the history of the law of nations. When James Kent produced the first digest of American law in 1826, for example, he not only began his *Commentaries* with a chapter on the law of nations, but also opened that chapter with the assertion that “when the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom, had established among the civilized nations of Europe, as their public law.” He acknowledged that opinions differed over the foundation of the law of nations, whether as “a mere system of positive institutions” or as “essentially the same as the law of nature, applied to the conduct of nations.” Like the majority of his contemporaries, Kent concluded that neither was exclusively true: “There is a natural and a positive law of nations.”⁹¹

The Declaration of Independence was a product of the jurispruden-

⁹⁰ Len Travers, *Celebrating the Fourth: Independence Day and the Rites of Nationalism in the Early Republic* (Amherst, Mass., 1997), 21–23, 161, 206; David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776–1820* (Chapel Hill, 1997), 30–35, 99–102, 206–07, 219–29, 240, 311–13; Maier, *American Scripture*, 160, 191 (quotation).

⁹¹ Kent, *Commentaries on American Law*, 4 vols. (New York, 1828), 1:2; Mark Weston Janis, “American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition,” *Netherlands International Law Review*, 39 (1992), 38–39. On the relationship of American municipal law to international law in this period see Stewart Jay, “The Status of the Law of Nations in Early American Law,” *Vanderbilt Law Review*, 42 (1989), 819–49, and the debate between John C. Yoo, “Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding,” *Columbia Law Review*, 99 (1999), 1955–2094, and Martin S. Flaherty, “History Right? Historical Scholarship, Original Understanding, and Treaties as ‘Supreme Law of the Land,’” *ibid.*, 2095–2153, with the reply by Yoo, “Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution,” *ibid.*, 2218–58.

tial eclecticism of the late eighteenth century. Neither wholly naturalist nor exclusively positivist, it appealed to the "Laws of Nature, and of Nature's God" to empower the United States "to do all other acts and things which independent states may of right do." Its argument rested on natural law, but ends with a statement of the positive powers of states. The international reception of the Declaration concentrated on the latter at the expense of the former; the domestic reception, on individual rights rather than the capacities of states. Beyond the United States, appeals to natural rights competed throughout the western world during much of the nineteenth century with more compellingly collective political languages such as corporatism and socialism or the skeptical calculations of utilitarianism. These languages were variously hostile to the individualism of modern theories of natural rights, and none proved hospitable to the naturalistic claims to "life, liberty, and the pursuit of happiness." Utilitarianism and collectivism held less appeal in American intellectual life, and this in itself may account for the divergence in European and American perceptions of the Declaration's central message. Yet even after its appropriation into an exclusively American civil religion, the Declaration could still be read as a document of positive international law, detailing the collective rights of states rather than the particular rights of individuals. Thus James Brown Scott suggested in 1917 that the federal structure of the United States could be the model for a larger pacific world federation, with the Declaration as the charter for a new league of nations, the Articles of Confederation as its blueprint, and the United States Constitution as its guiding set of principles.⁹² That such a proposal now seems merely quaint is a sign that the individualistic, natural rights interpretation of the Declaration has become unavoidable, while its prescriptions for the rights of states as international actors have been almost entirely forgotten.

To return the Declaration to its immediate international context reveals the Janus-faced nature of the American Revolution itself. The Declaration built on a conception of natural law in the international realm that was obsolescent, but by its European reception provided evidence of the emergent positivism of its age. It thus pointed both backward to the seventeenth century and forward to the nineteenth and twentieth centuries. Similarly, the American Revolution has been seen as both a belated episode in the history of early modern rebellions and the prototype for modern decolonization movements, again harking back to

⁹² Scott, ed., *The Declaration of Independence, The Articles of Confederation, The Constitution of the United States* (New York, 1917), xvii-xix; Scott, *The United States of America: A Study in International Organization* (New York, 1920), x, 467-69.

the sixteenth century while laying foundations for the twentieth.⁹³ Though the Declaration has been called “the first national independence document in the world,” that honor is perhaps better accorded to the Dutch Act of Abjuration, the *Plakkaat van Verlatinge* (1581), in which the leaders of the Dutch Revolt cast off their allegiance to the Spanish Habsburgs.⁹⁴ The Irish Confederation of Kilkenny had achieved *de facto* independence from England (with *de facto* recognition by the papacy) between 1641 and 1649.⁹⁵ Closer in time to the American Revolution, Corsican rebels had proclaimed their independence from Genoa in 1735, only to be absorbed by France in 1768, while the Crimean Tartars had cast off their allegiance to Turkey in 1772 to find themselves almost immediately a dependency of Catherine the Great’s Russia.⁹⁶ By the late eighteenth century, the American Revolution became assimilated in histories of international affairs to the rebellions and independence movements of the Dutch Republic, Corsica, and the Crimea.⁹⁷ Yet, within a generation, the 1770s could be held to have signaled the “total abandonment of public no less than private morality which marked the latter portion of the 18th century . . . from this inauspicious moment may be dated

⁹³ On the former, see for example J.C.D. Clark, *The Language of Liberty, 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge, 1994); on the latter, Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (New York, 1963); Thomas C. Barrow, “The American Revolution as a War for Colonial Independence,” *WMQ*, 3d Ser., 25 (1968), 452–64; Richard B. Morris, *The Emerging Nations and the American Revolution* (New York, 1970); Edwin G. Burrows and Michael Wallace, “The American Revolution: The Ideology and Psychology of National Liberation,” *Perspectives in American History*, 6 (1972), 167, 279–80; and D. George Boyce, *Decolonisation and the British Empire, 1775–1997* (Basingstoke, 1999), 21–28.

⁹⁴ Blaustein, Sigler, and Breede, eds., *Independence Documents of the World*, 2:733; “The Dutch Declaration of Independence” (July 26, 1581), *Old South Leaflets*, No. 72 (Boston, 1896); J.P.A. Coopmans, “Het Plakkaat van Verlatinge (1581) en de Declaration of Independence (1776),” *Bijdragen en Mededelingen betreffende de Geschiedenis der Nederlanden*, 98 (1983), 540–67; Lucas, “The ‘Plakkaat van Verlatinge’: A Neglected Model for the American Declaration of Independence,” in Rosemarijn Hoefte, Johanna C. Kardux, and Hans Bak, eds., *Connecting Cultures: The Netherlands in Five Centuries of Transatlantic Exchange* (Amsterdam, 1994), 187–207; Lucas, “Rhetorical Ancestry of the Declaration of Independence,” 159–69.

⁹⁵ Jane H. Ohlmeyer, “Ireland Independent: Confederate Foreign Policy and International Relations during the Mid-Seventeenth Century,” in Ohlmeyer, ed., *Ireland from Independence to Occupation, 1641–1660* (Cambridge, 1995), 89–112.

⁹⁶ Thadd E. Hall, *France and the Eighteenth-Century Corsican Question* (New York, 1971); Alan W. Fisher, *The Russian Annexation of the Crimea, 1772–1783* (Cambridge, 1970).

⁹⁷ For example, Johann Jacob Moser, *Versuch des neuesten Europäischen Völkerrechts*, 10 vols. (Frankfurt am Main, 1777–1780), 6:126–47 (Corsica, Crimea, the United States); Steck, “Versuch von Erkennung der Unabhängigkeit einer Nation, und eines Staats,” in Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse*, 49–56 (the United Provinces, Crimea, the United States).

the decline of the International system of Europe," marked especially by the Partitions of Poland and by the Franco-American alliance of 1778.⁹⁸

The American colonists were not colonized peoples; this basic circumstance renders any facile assimilation of the American Revolution to the decolonization movements of the second half of the twentieth century implausible. Nor was the American Revolution a nationalist revolt, in the sense that a self-conscious "people" recovered a suppressed collective identity as the motive for a rebellion against their colonial masters. The American Revolutionaries were forced to create states out of colonies as they also began to recognize themselves as members of the same nation. They had to become independent in order to realize their interdependence. They could only declare that independence to a "candid world" in the available languages of the law of nations; by so doing, they offered themselves as willing participants in an international system created by common norms, customs, and agreements. Unlike the French Revolution, the American Revolution was not a nationalistic affront to international stability: as Friedrich Gentz noted in 1800, its aims were more limited, and its maxims not so plainly destructive to the law of nations, because the Americans had requested admission to the international order with their Declaration of Independence rather than threatened its overthrow.⁹⁹ The successful incorporation of the United States into that international order obscured the fact that the American Revolution was as much about the creation of states (in the international sense) as it was about the birth of a nation. The Declaration of Independence aimed to achieve the one but gradually came to be assimilated to the other, as what originated as a document characteristic of the eclecticism of contemporary international law became instead a talisman in a specifically national mythology.

⁹⁸ Eden, *Historical Sketch of the International Policy of Modern Europe*, 81–82.

⁹⁹ John C. Rainbolt, "Americans' Initial View of Their Revolution's Significance for Other Peoples, 1776–1788," *The Historian*, 35 (1973), 430–33; Friedrich von Gentz, *The Origin and Principles of the American Revolution, Compared with the Origin and Principles of the French Revolution*, trans. John Quincy Adams (Philadelphia, 1800). David Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (Oxford, 1993), 42–112, 204–25, illuminatingly compares the American and French Revolutions in this regard.